Supreme Court, U.S.
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(1)

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CECIL FOREHAND,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

LARRY J. STEELE
Attorney at Law
P.O. Box 561
Walnut Ridge, AR 72476
(501) 886-5840

27 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the petitioner was denied due process guaranteed by the Fourteenth Amendment of the Federal Constitution by the conviction of a crime following a prosecution in which the accused did not enter a plea of guilty and the prosecution introduced no evidence of the accused's guilt.

II.

Whether the petitioner was denied due process guaranteed by the Fourteenth Amendment of the Federal Constitution when the state court supplemented the record after trial and notice of appeal.

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A. The petitioner was convicted of Driving While Intoxicated, Second Offense, (within three years) when no evidence of the date of the first offense was offered into evidence.

II. WHETHER THE PETITIONER WAS DENIED DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHEN THE STATE COURT SUPPLEMENTED THE RECORD AFTER TRIAL AND NOTICE OF APPEAL.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. _____

CECIL FOREHAND,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

Cecil Forehand respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals in this case.

DECISIONS OF THE COURT BELOW

The decision of the Arkansas Court of Appeals entered on February 22, 1995 is not reported. The order of the Arkansas Supreme Court entered on March 27, 1995, denying review, is not reported. The decision of the Arkansas Court of Appeals is included in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The decision of the Arkansas Court of Appeals was entered on February 22, 1995. The order of the Arkansas Supreme Court was entered on March 27, 1995. This Petition is being filed within 90 days of this date.

This Court's certiorari jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy, in addition to the right to a speedy and public trial, a trial by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No state shall deprive any person of life, liberty or property without due process of law."

STATEMENT OF FACTS

The petitioner was convicted of DWI II and refusing the breath test by a Greene County Circuit Court jury. The appellant was sentenced to thirty days in the county jail and a fine of Two Thousand Seven Hundred Fifty Dollars, and his driver's license suspended for twelve months.

The petitioner does not dispute he was intoxicated, but contends that the State of Arkansas offered no evidence on which to base a prior DWI conviction for the purpose of enhancement under the Arkansas Habitual Offender Statute.

The court held that DWI II was appropriate based on a prior judgment dated March 11, 1991, but which was silent as to the offense date. The court then instructed the jury in a bifurcated trial that the jury should impose its sentence based on the petitioner's second conviction within three years.

The court made the following statement concerning it's determination that DWI II was proper. The following discussion was held at the bench out of the hearing of the jury:

> THE COURT: These are the four sentencing instructions that I'm going to give and the Court's made a finding that -- makes a finding based upon the submission of a judgment dated March eleven, ninety-one, in the court docket CR-90-5 that this punishment would be applicable and it's also

based upon the other two that we looked at previously. So these three forms I'm going to give.

MR. STEELE [Defense Counsel]: Your Honor, note my objection. As of this date, I haven't seen anything that actually shows for verification of the original charge which would be the basis of a D.W.I. two.

THE COURT: Well, that's what I'm giving you. I'm giving you the entire file, CR-90-5, which reflects the Municipal Court findings, dockets, dates, and a subsequent Circuit Court finding that also reflects two previous ones we talked about, 89-131 and 89-132.

MR. STEELE: I guess that will be part of the record?

THE COURT: Sure, make the whole thing part of the record. In fact I think you were involved in. I think you were the attorney of record in CR-90-5, so you ought to have actual knowledge of it. It indicates you were.

MR. STEELE: Yes, sir, I understand.

THE COURT: Okay, in fact you filed several pleadings in it. Any other questions?

MR. STEELE: No, your Honor.

THE COURT: Any other questions about the procedure?

MR. STEELE: No, I understand.

THE COURT: I'm going to give you all about five minutes more at the most to argue.

Additional statements made by the court out of the hearing of the jury:

THE COURT: Gentlemen, for the record, the Court had -- the Court had made a determination that at the close of the jury's bifurcation -- bifurcated portion finding Mr. Forehand guilty of D.W.I. and running a stop sign and so forth, the Court reviewed the record submitted by the State, specifically CR-90-5, which was a Circuit Court record of a conviction of a D.W.I. in the Municipal Court for the City of Paragould, and also reviewed CR-89-131 and 89-132 and from a review of those records, it was apparent to the Court that Mr. Forehand had had at least five previous D.W.I. convictions.

However, I found -- made a specific finding that the last one was reflected by CR-90-5 which occurred -- I believe it was -- in September of nineteen -

MR. WARMATH [Prosecutor]: September twenty-four, nineteen ninety.

THE COURT: ---nineteen ninety.

MR. WARMATH: Apparently within a five day period.

THE COURT: It was within fifteen -- fifteen -- fifteen days of the three year period and it reflected in 89-131 and 89-132 where other -- other D.W.I. convictions -- I believe one of those was a D.W.I. third conviction -- which would fall within the five year period to enhance the fine portion, and the Court found that he was, therefore, subject to punishment for D.W.I. second with regard to jail time and on the fine, the fine -- the Court determined the maximum would be Five Thousand Dollars based upon five prior offenses, and those records should be made a part of the record in this case if there's any appeal decision to be made. In fact I indicated that to you, Mr. Steele.

Petitioner's counsel restated his objection as follows:

MR. STEELE: My objectior previously was I didn't thin there was any verification in the record of his last D.W.I. which

would have been the first one for this -- this trial which formed the basis of a D.W.I. two in this case.

THE COURT: Well, I point out to you that the sentence was well within the range for D.W.I. one -- even the fine.

MR. STEELE: Well, I understand that, your Honor, but the objection went to the instructions on the -- to the jury for D.W.I. two as opposed to a one. We---

THE COURT: Well, but I didn't instruct then on any -- what I did is made a finding it was D.W.I. two.

MR. STEELE: Yes, sir.

THE COURT: But there have been cases that even if I had instructed improperly that -- so long as the sentence fell within the range of what the proper instruction would be -- assuming for argument -- you're correct. The sentence was within the range.

MR. STEELE: Well, I understand, but---

THE COURT: No fault, no harm.

MR. STEELE: ---it's just the fact that -- it's just the fact that---

THE COURT: Well, I -- I -- I think I'm correct in that the last D.W.I. was within fifteen days of the time limit of three years.

MR. WARMATH: Yes, sir, the current D.W.I. he was charged for was September the ninth, nineteen ninety-two, and the file you have there which was ninety -- is it -

THE COURT: Ninety, five -- ninety dash five.

MR. WARMATH: ---the offense occurred on September the twenty-fourth, nineteen eighty-nine. So it was within the three year period, and the Court is allowed to take judicial notice of prior convictions that are within three years, and I think that is appropriate in this matter.

MR. STEELE: My objection, your Honor, was the fact that the conviction date is noted, but there is nothing that I have see so far to indicate the date that the offense occurred, and that's what the case law says you have to use to determine convictions for purpose of enhancement.

In the bifurcated trial, the jury first found petitioner guilty of Driving While Intoxicated. After the colloquy quoted above, the court told the jury that this was petitioner's second DWI conviction within three years and that the penalty for a DWI II conviction included a fine of no less than $400.00 nor more than $3,000.00 and a sentence of a minimum of seven days or up to one year in the county jail. The jury returned a verdict of a fine in the amount of $2,750.00 and 30 days jail time.

The petitioner appealed this verdict to the Arkansas Court of Appeals based on the lack of evidence of a prior DWI. Petitioner's appeal was based on the fact that the sole evidence offered by the State of Arkansas of his prior DWI conviction was a judgment which was silent as to the offense date.

The Arkansas Supreme Court has previously stated in Rogers v. State, 293 Ark. 414, 738 S.W.2d 412 (1987), that the dates the defendant's prior offenses were committed are the determination dates for determining the applicability of enhanced punishment.

After the petitioner filed his Notice of Appeal to the Arkansas Court of Appeals and the record of the proceedings below were filed, the State of Arkansas filed a Motion to Supplement the Record because it was obvious that there was no evidence of the date of the prior conviction upon which petitioner's charge was enhanced.

The petitioner objected contending that he was denied due process when the court assumed a prosecutorial role by offering evidence and supplementing the record. By supplementing the record after the trial of the matter and the record had been docketed, the petitioner was subjected to double jeopardy.

At the hearing to supplement the record conducted by the trial judge, the court introduced into evidence the Information and Judgment of a prior DWI of petitioner's. The Information reflected that petitioner was charged with a DWI on September 24, 1989 but the Judgment remained silent as to the offense date. Based on these pleadings, the court noted that the offense occurred within the three year period immediately prior to September 9, 1992, the date of petitioner's alleged second offense.

Based on this evidence, the Arkansas Court of Appeals affirmed the State Circuit Court's conviction.

Petitioner cited the following Arkansas cases in his brief to the Arkansas Court of Appeals in addition to his due process argument pursuant to the Fourteenth Amendment to the Constitution of the United States.

The burden of proof is on the state to prove the defendant's prior convictions for the purposes of sentencing under the habitual offender statute. Elmore v. State, 268 Ark. 225, 595 S.W.2d 218 (1980). Allen v. State, 294 Ark. 209, 742 S.W.2d 886 (1988).

BEST AVAIL

The dates the defendant's prior offenses were committed are the determinative dates for determining the applicability of enhanced punishment. Rogers v. State, 293 Ark. 414, 738 S.W.2d 412 (1987).

It is improper for a trial judge to needlessly inject himself into a trial. Kitchen v. State, 271 Ark. 1 (1980).

It is the responsibility of the trial judge to maintain an appropriate balance in the performance of his role impartially and a clear transgression of the proper bounds must be demonstrated before an appellate court is justified in reversing a judgment because of the trial judge's interjecting himself into a trial. Kitchen, supra.

The proper role of a trial judge (in voir dire) is to direct the process... Anderson v. State, 278 Ark. 171 (1983).

REASONS FOR GRANTING WRIT

I.

WHETHER THE PETITIONER WAS DENIED DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION BY THE CONVICTION OF A CRIME FOLLOWING A PROSECUTION IN WHICH THE ACCUSED DID NOT ENTER A PLEA OF GUILTY AND THE PROSECUTION INTRODUCED NO EVIDENCE OF THE ACCUSED'S GUILT.

ABLE COPY

A. The petitioner was convicted of Driving While Intoxicated, Second Offense, (within three years) when no evidence of the date of the first offense was offered into evidence.

In a bifurcated trial after the jury determined guilt, the court instructed the jury that the petitioner had previously been convicted of one prior DWI within three years of this offense. At the trial of the matter, the sole evidence before the court was the Judgment of the prior DWI which remained silent as to the date of the first offense and was used for enhancement purposes.

Amendment Six to the United States Constitution states in part that in all criminal prosecutions, the accused shall enjoy, in addition to the right to a speedy and public trial, a trial by an impartial jury. The court's instruction to the jury that this was petitioner's second offense was prejudicial and removed the impartiality of the jury.

Amendment Fourteen to the United States Constitution states in part that no state shall deprive any person of life, liberty or property without due process of law. Due process of law in layman's terms has been defined in numerous cases as "fundamental fairness."

Note that a conviction of crime without evidence may be attacked on constitutional grounds unrelated to the due process clause. See in this connection United States ex rel. Caminito v. Murphy, (1955, CA2 NY) 222 F2d 698, cert. den. 350 US 896, 100 L ed 788, 76

S.Ct. 155, in which the court said that to jail a man convicted without evidence of guilt is to impose involuntary servitude which, except as punishment for crime, the Thirteenth Amendment to the Federal Constitution forbids.

The landmark case on the question whether a denial of due process of law inheres in a conviction of crime at the conclusion of a trial at which the prosecution produced no evidence, either that a crime was committed or that the accused committed it, is Thompson v. Louisville, (1960) 362 US 199, 4 L ed 2d 654, 80 S.Ct. 642, 80 ALR2d 1355.

The court in Thompson, supra, referred to, in direct support of the proposition, the following cases: Yick Wo v. Hopkins, (1886) 118 US 356, 30 L ed 220, 6 S.Ct. 1064; Moore v. Dempsey, (1923) 261 US 86, 67 Led 543, 43 S.Ct. 265; United States ex rel. Vajtauer v. Commissioner of Immigration, (1927) 273 US 103 71 L ed 560, 47 S.Ct. 302; Schware v. Board of Bar Examiners, (1957) 353 US 232, 1 L ed 2d 796, 77 S.Ct. 752, 64 ALR2d 288.

Of particular interest is an Arkansas case cited by the court in Thompson, supra, Cole v. Arkansas, (1948) 333 US 196, 92 L ed 644, 68 S.Ct. 514, holding that a conviction upon a charge not made would be sheer denial of due process.

The Supreme Court in Thompson, supra, cited Cole, supra, as a "see also" case in which it was declared to be as much a violation of due process to send an accused to prison following conviction on a charge

on which he was never tried as it would be to convict him upon a charge that was never made.

II.

WHETHER THE PETITIONER WAS DENIED DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WHEN THE STATE COURT SUPPLEMENTED THE RECORD AFTER TRIAL AND NOTICE OF APPEAL.

A. After petitioner filed his appeal from the state court and lodged the record with the Arkansas Court of Appeals, the state court supplemented the record with an order whereby the lower court took judicial notice of petitioner's prior conviction based on an Information containing the alleged date of the prior charge.

Amendment Five to the United States Constitution states in part that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

The Order of the Arkansas Supreme Court, allowing the State Circuit Court to supplement the record after a jury trial was complete and the record docketed with the Arkansas Supreme Court, was tantamount to double jeopardy and was "fundamentally unfair." It was fundamentally unfair for the judge to take an active role in an attempt to correct a previous error.

An early case applying the Bill of Rights (First Ten Amendments) to the states by virtue of the Fourteenth Amendment was Duncan v. State of Louisiana, 391 U.S. 145,

88 Sup.Ct. 1444, 20 L.Ed.2d 491. In the landmark decision, the Supreme Court held that it was fundamental to the American scheme of justice that the Fourteenth Amendment guarantees (due process) and First Ten Amendments would apply to the states.

In the case at bar, the lower court relies solely on the Information filed in the first case as evidence of the date of the first occurrence. The Arkansas Court of Appeals noted that petitioner's attorney had filed a Motion in Limine stating that the date of the first occurrence was September 25, 1989. Neither of these facts were alleged or relied upon by the State of Arkansas in the original proceeding. Only after the state court supplemented the record, did the court refer to the Information. Even if the Information was correctly accepted into evidence (which petitioner contends it was not), the Information is not sufficient to support the finding by the state court that the evidence of the first offense was sufficient for enhancement purposes under the state's habitual offender statute. The Motion in Limine filed by petitioner's counsel should be viewed in the same light as testimony given by a defendant in a suppression hearing pursuant to Simmons v. United States, 390 U.S. 377, 389 (1968).

Respect for the law by a people is the fabric of society. It distinguishes a civilized society from a barbaric society. Respect is gained from the application of the laws by the judicial system.

When the courts bend or break the rules (law) simply to achieve a desired outcome (in this case to correct an error), that respect for the law is weakened.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LARRY J. STEELE
Ark. Bar No. 78146
P.O. Box 561
Walnut Ridge, AR 72476
(501) 886-5840

Counsel for Petitioner

APPENDIX

ARKANSAS COURT OF APPEALS

No. CACR 93-692

CECIL FOREHAND,

Appellant

v.

STATE OF ARKANSAS,

Appellee

Appeal from the Greene County,
Circuit Court
Honorable David Burnett, Judge

Opinion Delivered February 22, 1995

AFFIRMED.

JOHN B. ROBBINS, Judge

Appellant Cecil Forehand was convicted by a jury of DWI second offense, refusing to submit to a breathalyzer test, running a stop sign, and driving without headlights. He was sentenced to 30 days in the county jail and was fined a total of $2,845.00. In addition, Mr. Forehand's driver's license was suspended for 12 months. He now appeals, arguing that the trial court erred in its finding that his DWI conviction constituted a second offense. Specifically, Mr. Forehand alleges that there was a lack

of proof that he committed two DWIs within a three-year period. We find no error and affirm.

Officer Gregory Schug of the Paragould Police Department testified that he was patrolling in the early morning hours of September 9, 1992, when he observed Mr. Forehand driving with his headlights off. Officer Schug then observed Mr. Forehand's vehicle roll through a stop sign before coming to a stop. When Officer Schug confronted Mr. Forehand, Mr. Forehand fell back against his car, and Officer Schug detected an odor of alcohol. After administering sobriety tests, Officer Schug transported Mr. Forehand to the police station for the purpose of administering a breathalyzer test. However, Mr. Forehand refused to take the test.

For reversal, Mr. Forehand does not dispute that he was driving while intoxicated. Rather, he contends that he was erroneously convicted of DWI second offense because there was no record of when he committed the first DWI. Arkansas Code Annotated § 5-65-111 (Repl. 1993) provides for sentence enhancement if a DWI offense occurs within three years of an earlier DWI offense. Under the Omnibus DWI Act, an "offense" occurs when the criminal act is committed. Rogers v. State, 293 Ark. 414, 738 S.W.2d 412 (1987).

In the case at bar, it is undisputed that the latter of the two DWIs in question was committed on September 9, 1992. Therefore, if Mr. Forehand's earlier DWI was

committed on September 9, 1989, or later, the court properly classified the latter DWI as a second offense. During the sentencing phase of the trial, the trial judge stated that Mr. Forehand had committed a DWI within three years of his September 9, 1992 DWI. However, although the judgment and commitment order from the previous DWI showed that he pleaded guilty to DWI on March 11, 1991, the order was silent as to when that DWI was actually committed. For this reason, Mr. Forehand objected to the finding that his September 9, 1992 DWI constituted a second offense. The trial judge overruled this objection, and Mr. Forehand now asserts that this was error given the lack of proof of when the initial DWI was committed.

After Mr. Forehand filed an abstract and appellant's brief, appellee requested that the case be remanded to circuit court to supplement the record. The supreme court granted this request, and the circuit judge thereafter entered an order settling or supplementing the record. In this order the circuit judge explained that his determination that the two DWIs were committed within three years of each other was based on the information filed in the previous case, which stated that this DWI was committed on or about September 24, 1989. The information filed in the first DWI case has now been filed as a supplement, and although absent from the initial record it was before the trial court at the March 1, 1993, trial.

We find no error on the part of the trial court in the instant case because the information from Mr. Forehand's previous DWI clearly shows that his DWIs were committed within a three-year period. In addition, we note that Mr. Forehand admitted in a motion in limine that his last DWI for enhancement purposes occurred on September 25, 1989. This is consistent with the information which asserted that the prior DWI was committed on or about September 24, 1989.

Affirmed.

Jennings, C.J., and Mayfield, J. agree.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS

March 27, 1995

Larry J. Steele
Attorney at Law
P.O. Box 561
Walnut Ridge, AR 72476-0561

RE: CR 95 00190 CECIL FOREHAND v. STATE OF ARKANSAS

Dear Mr. Steele:

The Arkansas Supreme Court made the following order toady in the above styled case:

"Petition for review is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh

cc: J. Brent Standridge
Ellen Johnson, Clerk
(#CR92-153)